

**Updated Informative Digest for the State Board of Equalization's
Adoption of Proposed Amendments to California Code of Regulations,
Title 18, Section 1699, *Permits***

The State Board of Equalization (Board) held a public hearing regarding the proposed amendments to California Code of Regulations, title 18, section (Regulation) 1699, *Permits*, on March 25, 2014. During the public hearing, the Board unanimously voted to adopt the proposed amendments to Regulation 1699 without making any changes.

The Board did not receive any written comments regarding the proposed regulatory action and no interested parties appeared at the public hearing on March 25, 2014, to comment on the proposed regulatory action. There have not been any changes to the applicable laws or the effect of, the objectives of, and anticipated benefits from the adoption of the proposed amendments to Regulation 1699 described in the informative digest included in the notice of proposed regulatory action. The informative digest included in the notice of proposed regulatory action provides:

Current Law

In general, the Sales and Use Tax Law (Rev. & Tax. Code, § 6001 et seq.) requires every person desiring to engage in or conduct business as a seller of tangible personal property in California to apply to the Board for a seller's permit. (Rev. & Tax. Code, §§ 6014, 6066.) Under RTC section 6070, if a person fails to comply with any provision of the Sales and Use Tax Law, such as failure to remit payment of taxes, the Board can take action to revoke the person's seller's permit. This section also states that, after a person's seller's permit is revoked, the Board shall not issue a new permit to that person until it is satisfied the person will comply with the law.

RTC section 6070.5, as enacted by Assembly Bill No. (AB) 1307 (Stats. 2011, ch. 734), authorizes the Board to refuse to issue or revoke a seller's permit under certain conditions. Prior to the enactment of RTC section 6070.5, the Board did not have express statutory authority to refuse to issue a seller's permit to a person desiring to engage in the business of selling tangible personal property in California, unless the Board had previously revoked the person's seller's permit under RTC section 6070. And, the Board sponsored the enactment of RTC section 6070.5 to "provide additional tools that would assist the [Board] in reducing its growing outstanding accounts receivable balances from [the] failure to remit the taxes that are owed" (September 9, 2011, Assembly Floor Analysis of AB 1307.)

Currently, RTC section 6070.5, subdivision (a), provides that the Board may refuse to issue a permit to any person submitting an application for a

seller's permit as required under RTC section 6066 if the person desiring to engage in or conduct business as a seller in California has an outstanding final liability for any amount due under the Sales and Use Tax Law. RTC section 6070.5, subdivision (b), provides that the Board may also refuse to issue a seller's permit if the person desiring to engage in or conduct business as a seller in California is not a natural person or individual and any person controlling the person desiring to engage in or conduct business as a seller within this state has an outstanding final liability as provided in subdivision (a). For purposes of subdivision (b), the word "controlling" has the same meaning as the word "controlling" as defined in Business and Professions Code section 22971. Business and Professions Code section 22971, cited in the statute, provides in relevant part:

- (d)(1) "control" or "controlling" means possession, direct or indirect, of the power:
 - (A) To vote 25 percent or more of any class of the voting securities issued by a person.
 - (B) To direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, other than a commercial contract for goods or nonmanagement services, or as otherwise provided; however, no individual shall be deemed to control a person solely on account of being a director, officer, or employee of that person.
- (2) For purposes of subparagraph (B) of paragraph (1), a person who, directly or indirectly, owns, controls, holds, with the power to vote, or holds proxies representing 10 percent or more of the then outstanding voting securities issued by another person, is presumed to control that other person.
- (3) For purposes of this division, the board may determine whether a person in fact controls another person.

RTC section 6005 defines the term "person" for purposes of the Sales and Use Tax Law. It currently provides that the term includes "any individual, firm, partnership, joint venture, limited liability company, association, social club, fraternal organization, corporation, estate, trust, business trust, receiver, assignee for the benefit of creditors, trustee, trustee in bankruptcy, syndicate, the United States, this state, any county, city and county, municipality, district, or other political subdivision of the state, or any other group or combination acting as a unit." The word "individual," as used in RTC section 6005, refers to a natural person. A person is "not a natural person or individual" (non-natural person) referred to in RTC section 6070.5, subdivision (b), if the person is not an "individual" under RTC section 6005.

In addition, under RTC section 6070.5, subdivision (c), a liability will not be deemed to be outstanding if the person applying for a seller's permit has entered into an installment payment agreement pursuant to RTC section 6832 for the payment of the liability and is in full compliance with the terms of the installment payment agreement. However, RTC section 6070.5, subdivision (d), also provides that if the person submitting an application for a seller's permit has entered into an installment payment agreement as provided in subdivision (c) and fails to comply with the terms of the installment payment agreement, then the Board may seek revocation of the person's seller's permit obtained pursuant to the provisions of subdivision (c).

RTC section 6070.5, subdivision (e), requires the Board to provide a person with written notice of the denial of a seller's permit under RTC section 6070.5. This subdivision also provides that a person who is denied a seller's permit may seek reconsideration of the Board's denial by submitting a written request for reconsideration to the Board within 30 days of the date of the notice of denial. In addition, this subdivision provides that the Board shall provide a person submitting a timely written request for reconsideration a hearing in a manner that is consistent with a hearing provided for by RTC section 6070. However, if no written request for reconsideration is submitted within the 30-day period, the denial of the person's seller's permit becomes final at the end of the 30-day period.

Finally, RTC section 6070.5, subdivision (f), provides that the Board shall consider offers in compromise when determining whether to issue a seller's permit.

Regulation 1699 currently implements, interprets, and makes specific the provisions of RTC sections 6066, 6067, 6070, 6071.1, 6072, 6073, 6075, and 6225. As relevant here:

- Regulation 1699, subdivision (a), generally provides that every person engaged in the business of selling or leasing tangible personal property of a kind the gross receipts from the retail sale of which are subject to sales tax is required to hold a seller's permit for each place of business in this state at which transactions relating to sales are customarily negotiated with his or her customers;
- Regulation 1699, subdivision (f), currently states that a seller's permit may only be held by a person actively engaged in business as a seller of tangible personal property; and
- Regulation 1699, subdivision (f), further states that the Board may revoke a seller's permit where it finds that the person holding the permit is not actively engaged in business as a seller of tangible personal property.

Effect, Objectives, and Benefits of the Proposed Amendments to Regulation 1699

Need for Clarification

Prior to January 1, 2012, the effective date of RTC section 6070.5, if a person had an outstanding final liability with the Board and voluntarily closed its seller's permit before it was revoked under RTC section 6070, the Board could not refuse to issue another seller's permit to that person under RTC section 6070. Therefore, a person who failed to properly remit taxes and had an outstanding final liability could close out its seller's permit and then apply for a new seller's permit from the Board. And, in that situation, because the original permit was not revoked, the Board lacked the authority to refuse to issue the new permit. Under RTC section 6070.5, subdivision (a), however, the Board now has authority to refuse to issue a permit to such a person with an outstanding final liability.

In addition, prior to January 1, 2012, if a person had its seller's permit revoked under RTC section 6070 because the person failed to properly remit taxes and had an outstanding final liability, the person could still obtain a new seller's permit by transferring its business to a non-natural person that the person directly or indirectly controlled and having the non-natural person apply for the new seller's permit. For example, if the Board revoked the seller's permit held by an individual operating a business as a sole proprietorship, then the individual could:

- Form a wholly-owned corporation that the individual could directly control by owning all of the corporation's voting stock, the individual could transfer the business to the corporation, and the corporation could apply for a new seller's permit to operate the business; or
- Form a corporation that the individual's relative, such as the individual's spouse, owns and which the individual can indirectly control through means other than direct stock ownership, the individual could transfer the business to the corporation in a sale that was not at arm's length, and the corporation could apply for a new seller's permit to operate the business.

And, in either situation, the Board could not refuse to issue a seller's permit to the non-natural person, under RTC section 6070, because the non-natural person applying for the permit was not the same person who had its seller's permit revoked under RTC section 6070. Under RTC section 6070.5, subdivision (b), however, the Board now has authority to refuse to issue a seller's permit to a non-natural person applying for a new permit if the non-natural person is controlled by a person that has an outstanding final liability with the Board.

Because the enactment of RTC section 6070.5 gave the Board new authority to refuse to issue a seller's permit to a person with an outstanding final liability and to a non-natural person that is controlled by a person with an outstanding final liability, regardless of whether the person had a prior seller's permit revoked. And, there is an issue because Regulation 1699, which applies to applications for seller's permits, does not currently provide applicants with any notice regarding the Board's new authority under RTC section 6070.5 or provide clear guidance to applicants as to how the Board will implement and interpret RTC section 6070.5. Board staff determined that it was necessary to clarify Regulation 1699 to address this issue.

Interested Parties Process

As a result, Business Taxes Committee staff drafted amendments to Regulation 1699. The draft amendments suggested adding a new subdivision (g) to the regulation, renumbering the regulation's current subdivisions (g) through (j), as subdivisions (h) through (k), respectively, and adding a reference to RTC section 6070.5 to the regulation's reference note.

The draft subdivision (g) prescribed the circumstances under which the Board may refuse to issue a seller's permit to or revoke a permit from a person with an outstanding final liability or a person controlled by a person with an outstanding final liability under RTC section 6070.5. The draft subdivision (g) incorporated the definition of the words "control" and "controlling" provided in Business and Professions Code section 22971, subdivision (d)(1)(B), quoted above. The draft subdivision (g) implemented, interpreted, and made specific the definition of "control" and "controlling" for purposes of RTC section 6070.5 by establishing:

- A presumption that a person has the power to control a non-natural person if the person holds 25 percent or more of any class of the voting securities issued by the non-natural person, as provided in Business and Professions Code section 22971, subdivision (d)(1)(A);
- A presumption that a general partner has the power to control its partnership, a managing member of a limited liability company has the power to control its limited liability company, and a president or director of a closely held corporation has the power to control its corporation; and
- A presumption that a person has the power to control a non-natural person if the person transferred its business to the non-natural person in a sale that was not at arm's length in order to address the situation (described above) in which a person with an outstanding

final liability transfers its business to a non-natural person in a sale that was not at arm's length and the non-natural person applies for a new seller's permit to operate the business.

In addition, the presumption regarding whether a person has the power to control another person in draft subdivision (g) specifies that the Board will presume that a sale of a business is not at arm's length if it is between and among relatives by blood or marriage.

Business Taxes Committee staff subsequently provided its draft amendments to Regulation 1699 to the interested parties and conducted an interested parties meeting to discuss the draft amendments in July 2013. At the meeting, there were questions regarding the term "outstanding final liability."

The questions generally pertained to the nature of and the responsibility for an outstanding final liability. The interested parties wanted to know if the provisions of RTC section 6070.5 applied to certain types of outstanding final liabilities, but not others. For example, a participant asked if a person's outstanding final liability was the result of an audit performed when the person closed its business, the Board's disallowance of the person's claimed exemptions, or an "honest mistake," would those types of liabilities be sufficient for the Board to refuse to issue a seller's permit to that person? In response, staff stated that RTC section 6070.5 does not differentiate between outstanding final liabilities that result from different types of non-compliance issues, but rather, a person having any type of outstanding final liability for any amount due under the Sales and Use Tax Law may be refused a seller's permit under that section. In addition, staff explained that if a person receives a Notice of Determination for understated sales or use tax, the amount due which is not paid after the person's appeals have been exhausted and the person's liability is final is considered a final outstanding liability for purposes of RTC section 6070.5. Staff also explained that a final outstanding liability exists when a person has self-reported a tax liability, but has not paid the liability by the applicable due date.

Further, if an existing non-natural person has a final outstanding liability, an interested party wanted to know who would the liability "follow" and prevent from obtaining a seller's permit. Specifically, the participant wanted to know whether an officer who controlled a corporation with an outstanding final liability could be denied a seller's permit for a different entity due to the corporation's outstanding final liability. Staff responded that if a corporation has an outstanding final liability, the officers in control of that corporation do not automatically have an outstanding final liability for purposes of RTC section 6070.5 and cannot be denied a seller's permit for another entity based solely on the corporation's

outstanding final liability. However, if the Board determines that an officer is liable for a corporation's outstanding final liability, as a "responsible person" under RTC section 6829, and any portion of the responsible person liability remains unpaid when that determination becomes final, then the officer will have an outstanding final liability for purposes of RTC section 6070.5 that resulted from the corporation's outstanding final liability. And, in such a situation where a corporate officer is a person with an outstanding final liability, the Board may deny an application for a seller's permit for a non-natural person that is controlled by the officer under RTC section 6070.5.

Staff also noted at the July 2013 meeting that the statute is permissive and that staff's draft amendments to Regulation 1699 do not change the permissive nature of the Board's authority under the statute. Section 6070.5 gives the Board the authority not to issue seller's permits under specified circumstances. However, the statute does not require the Board to refuse to issue a seller's permit to any person with an outstanding final liability.

After the first interested parties meeting, Business Taxes Committee staff revised the draft amendments to Regulation 1699, provided the revised draft to the interested parties, and conducted a second interested parties meeting on September 3, 2013, to discuss the revised draft. The revised draft amendments included language to clarify the presumption regarding non-arm's length transactions among relatives in new subdivision (g)(3)(C). Specifically, language was added to explain that, "[a] transfer is among relatives if the person with the outstanding final liability is either a natural person who is a relative of the person or persons controlling the non-natural person acquiring the business[,] or is a non-natural person controlled by a relative or relatives of the person or persons controlling the nonnatural person acquiring the business." Staff also added language to explain that the presumptions regarding control provided in subdivision (g)(3) are rebuttable presumptions.

At the second interested parties meeting, a participant wanted to know whether the Board could issue a temporary seller's permit to a person while the person is filing a request for reconsideration of the denial of its seller's permit, and waiting for a hearing and the Board's decision on its request for reconsideration, which the participant believes could take an extensive amount of time. The argument was that the California economy could be unnecessarily harmed if the Board's initial decision to refuse to issue a business a seller's permit is based on inaccurate information or is just a bad decision, and the business is prevented from operating while it waits for a hearing and a favorable decision on its request for reconsideration. Staff's response to the question was that RTC section 6070.5 does not expressly provide for the issuance of temporary seller's

permits. And, the statute does not expressly allow for the revocation of a seller's permit, except for when a person does not fulfill the terms of the installment payment agreement that they entered into in order to obtain a seller's permit. Therefore, the statute does not provide for the issuance of a temporary seller's permit to a person who was denied a seller's permit under RTC section 6070.5, and submitting a timely written request for reconsideration to the appropriate district office is a person's only option to appeal the Board's denial of a permit under that section. However, staff also explained that a person with an outstanding final liability may enter into an installment payment agreement to ensure that the person may obtain a new seller's permit. And, staff stated that through policy, the district offices will be asked to expedite their review of requests for reconsideration of denials of seller's permits under RTC section 6070.5 to reduce the time applicants have to wait to address their seller's permit issues.

At the second interested parties meeting on September 3, 2013, staff also explained that the revisions made to the draft of Regulation 1699, subdivision (g)(3), are intended to explain that a person may control a non-natural person through the "ownership of voting securities" or a "contract," but that these are just examples of how a person may control another. And, after the second interested parties meeting, staff revised subdivision (g)(3) further to clarify that the "ownership of voting securities" or the existence of a "contract" are evidence that a person may control a non-natural person and disseminated the revised language on September 5, 2013, to those interested parties who participated in the September 3, 2013, meeting. Staff did not receive any comments on its revised drafts of the amendments to Regulation 1699 by the deadline of September 19, 2013. Therefore, staff prepared Formal Issue Paper 13-008 and distributed it to the Board Members on November 8, 2013, for consideration at the Board's November 19, 2013, Business Taxes Committee meeting.

November 19, 2013 Business Taxes Committee Meeting

Formal Issue Paper 13-008 recommended that the Board approve and authorize the publication of amendments adding new subdivision (g) to Regulation 1699. As explained above, new subdivision (g) implements, interprets, and makes specific the provisions of RTC section 6070.5. It provides that the Board may refuse to issue a seller's permit to a person if they have an outstanding final liability. In addition, it provides that the Board may refuse to issue a seller's permit to a non-natural person if a person with an outstanding final liability controls the non-natural person. Further, it provides that if the Board refuses to issue a seller's permit to a person under RTC section 6070.5, the person may file a timely written request for reconsideration. Or, the person may request to enter into an

installment payment agreement or an offer in compromise. Furthermore, it provides that if the installment payment agreement (or plan) is approved, a seller's permit could be issued. And, it provides that if the offer in compromise is approved and the person has paid the amount in full or remains in full compliance with the compromise plan, a seller's permit could also be issued. However, it also provides that the Board will have the authority to revoke a seller's permit if a person fails to meet the terms of the installment payment agreement or offer in compromise the person entered into to obtain the seller's permit.

During the November 19, 2013, Business Taxes Committee meeting, Chairman Horton suggested adding language to the proposed amendments to Regulation 1699 that would prohibit the Board from refusing to issue a permit to a person entering a different line of business, even if that person had an outstanding final liability from a prior business, as long as there was no financial risk to the state. The Board discussed the additional language and determined that it was not necessary at this time because the language staff recommended adding to new subdivision (g) of Regulation 1699 allows the Board to refuse to issue a seller's permit under certain circumstances, but does not require the Board to refuse to issue a seller's permit when doing so would not pose a financial risk to the state. Also, the language staff recommended adding to new subdivision (g) of Regulation 1699 provides for persons with outstanding final liabilities to enter into installment payment agreements and offers in compromise in order to establish that they are satisfying their outstanding final liabilities and that they qualify for the issuance of a seller's permit. Therefore, new subdivision (g) already provides procedures for a person with an outstanding final liability to establish that there is no financial risk in issuing the person a seller's permit and new subdivision (g) does not prohibit the Board from issuing a seller's permit to a person when there is no longer a financial risk to the state.

No members of the public appeared at the November 19, 2013, Business Taxes Committee meeting.

Therefore, at the conclusion of the Board's discussion of Formal Issue Paper 13-008 during the November 19, 2013, Business Taxes Committee meeting, the Board Members unanimously voted to propose the amendments to Regulation 1699 recommended in the formal issue paper. The Board determined that the proposed amendments to Regulation 1699 are reasonably necessary to have the effect and accomplish the objectives of implementing, interpreting, and making specific RTC section 6070.5 and addressing the issue that Regulation 1699 does not currently provide applicants for seller's permits with notice of and clear guidance regarding the Board's new authority under RTC section 6070.5.

The Board anticipates that the proposed amendments will benefit applicants for seller's permits and Board staff by:

- Making Regulation 1699 consistent with RTC section 6070.5;
- Providing additional notice that an application for a seller's permit may be denied, under RTC section 6070.5, if the applicant has an outstanding final liability or the applicant is controlled by a person with an outstanding final liability;
- Helping applicants with outstanding final liabilities and applicants controlled by a person with an outstanding final liability clearly understand that their applications for seller's permits will not be denied, under RTC section 6070.5, if they take appropriate steps to pay the final liabilities, including by entering into an installment payment agreement or offer in compromise, so that the liabilities are no longer "outstanding"; and
- Alleviating potential confusion regarding the manner in which RTC section 6070.5 will be implemented and interpreted by the Board.

The Board has performed an evaluation of whether the proposed amendments to Regulation 1699 are inconsistent or incompatible with existing state regulations and determined that the proposed amendments are not inconsistent or incompatible with existing state regulations because there is no other state regulation implementing, interpreting, or making specific the provisions of RTC section 6070.5. In addition, the Board has determined that there are no comparable federal regulations or statutes to Regulation 1699 or the proposed amendments to Regulation 1699.